

E-Filed 3/31/11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA

No. C 10-0756 RS

Appellant,

ORDER AFFIRMING JUDGMENT OF BANKRUPTCY COURT

V.

MICHAEL G. MOXLEY aka MGM'S
CABINET INSTALLATION SERVICE,

Appellee.

I. INTRODUCTION

Appellant Carpenters Pension Trust Fund for Northern California (the “Fund”) filed a complaint in the chapter 7 bankruptcy proceeding of appellee Michael Moxley. The Fund contends that an alleged debt based on Moxley’s withdrawal from the pension fund is nondischargeable under the Bankruptcy Code. After the bankruptcy court granted summary judgment in favor of Moxley, the Fund filed an appeal in this Court. For the reasons stated below, the decision of the bankruptcy court is affirmed.

II. BACKGROUND

In 1999 Moxley, as the sole owner and operator of MGM's Cabinet Installation, entered into a collective bargaining agreement with the 46 Northern California Counties Carpenters Conference

1 Board. Under the agreement, Moxley was required to make contribution to a multiemployer
2 pension fund. The parties' agreement expired in June 2004 and Moxley declined to renew it. For
3 purposes of this action, Moxley does not dispute that he effected a "withdrawal" from the pension
4 plan by continuing to perform work in the same location "of the type for which contributions were
5 previously required." 29 U.S.C. § 1383(b)(2). Under the Employee Retirement Income Security
6 Act (ERISA), withdrawal from a multiemployer plan triggers an employer's obligation to
7 compensate the plan for its share of the unfunded vested liability. *See* 29 U.S.C. § 1381.

8 In March 2005, the Fund notified Moxley that the amount of his withdrawal liability was
9 \$172,045 and included a schedule of payments pursuant to 29 U.S.C. 1399(b)(1). In February 2007,
10 the Fund filed suit in district court seeking to recover the amount allegedly owed. On November 16,
11 2008, Moxley filed a chapter 7 bankruptcy petition with the Bankruptcy Court for the Northern
12 District of California. The Fund initiated an adversary proceeding seeking an order from the
13 bankruptcy court that the withdrawal liability constitutes a nondischargeable debt. The Fund moved
14 for summary judgment and on November 18, 2009, the court entered its order denying the motion.
15 Based on its conclusion that no issues of material fact remained to be decided, it sua sponte granted
16 summary judgment in favor of Moxley. The Fund sought reconsideration, and after reviewing the
17 parties' arguments, the bankruptcy court denied the motion for reconsideration. Subsequently, the
18 Fund filed an appeal of the bankruptcy court's judgment in this Court.

19 III. LEGAL STANDARD

20 When considering an appeal from the bankruptcy court, a district court applies the same
21 standard of review that a circuit court would use in reviewing a decision of a district court. *See*
22 *Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir. 1997). A grant of summary judgment is
23 reviewed de novo. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). Under the
24 Federal Rules of Civil Procedure, a court shall grant summary judgment "if the pleadings,
25 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
26 show that there is no genuine issue as to any material fact and that the moving party is entitled to a
27 judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of
28 demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.

1 317, 323 (1986). The burden then shifts to the nonmoving party to “set forth specific facts showing
 2 that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). The nonmoving party must identify
 3 factual disputes that “might affect the outcome of the suit under governing law.” *Anderson v.*
 4 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Irrelevant or unnecessary factual disputes do not
 5 raise any genuine issue for trial. *Id.* To preclude entry of summary judgment, the nonmoving party
 6 must present sufficient evidence such that a jury could return a verdict in his or her favor. *Id.*

7 IV. DISCUSSION

8 A. Discharge of Debt Based on Withdrawal Liability

9 The Fund contends that the alleged withdrawal liability constitutes a nondischargeable debt
 10 under section 523(a)(4) of the Bankruptcy Code. Under that provision, a bankruptcy discharge does
 11 not relieve an individual of debt for defalcation while acting in a fiduciary capacity. 11 U.S.C. §
 12 523(a)(4). Defalcation involves the misappropriation or failure to account properly for “trust funds
 13 or money held in any fiduciary capacity.” *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186,
 14 1190 (9th Cir. 2001) (internal quotation marks and citations omitted). Under the Fund’s theory,
 15 Moxley serves in a fiduciary capacity with respect to the unpaid withdrawal liability and he has
 16 committed defalcation by failing to produce the money owed.

17 Pursuant to ERISA, a fiduciary of a plan includes a person who “exercises any discretionary
 18 authority or discretionary control respecting management or disposition of its assets.” 29 U.S.C. §
 19 1002(21)(A)(i). “Plan assets” within the meaning of ERISA do not include future contributions to a
 20 pension fund. *See Collins v. Pension & Ins. Comm. of the S. Cal. Rock Prods. & Ready Mixed*
Concrete Ass’ns, 144 F.3d 1279, 1282 (9th Cir. 1998) (citations omitted). Thus, as explained by the
 21 Ninth Circuit: “Until the employer pays the employer contributions over to the plan, the
 22 contributions do not become plan assets over which fiduciaries of the plan have a fiduciary
 23 obligation; this is true even where the employer is also a fiduciary of the plan.” *Cline v. Industrial*
Maintenance Eng’g & Contr. Co., 200 F.3d 1223 (9th Cir. 2000) (citations omitted).

26 The Fund contends that the Court in *Cline* merely stated a general rule that does not apply
 27 where the parties expressly agree that future contributions constitute plan assets. *See, e.g., Trs. of*
 28 *the S. Cal. Pipe Trades Health & Welfare Trust Fund v. Temecula Mech., Inc.*, 438 F. Supp. 2d

1 1156 (C.D. Cal. 2006). In *Temecula Mechanical*, the trust agreement at issue stated that assets of
 2 the fund consisted of “sums of money that have been or will be paid or which are due and owing.”
 3 *Id.* at 1165. A second agreement explained that trust assets included “such sums of money as have
 4 been or shall be paid” by employers to the fund. *Id.* at 1165-66. The court determined that it should
 5 give effect to the terms of the agreements negotiated by the parties, which defined unpaid
 6 contributions as fund assets. *Id.* at 1167. It therefore denied the defendants’ motion to dismiss a
 7 breach of fiduciary duty claim based on delinquent contributions. *Id.* at 1159.

8 In *Board of Trustees of the Laborers Health and Welfare Trust Fund for Northern California*
 9 *v. Atoll Topui Island, Inc.*, the district court adopted the magistrate judge’s report and
 10 recommendation entering default judgment against the defendant. No. C 06-3059 SBA, 2007 U.S.
 11 Dist. LEXIS 4307 (N.D. Cal. Jan. 22, 2007). In so doing, the court concluded that “*Cline* does not
 12 preclude the parties from making employer contributions ‘plan assets’ as a matter of contract.” No.
 13 C 06-3059 SB, Dkt. 27 at 6 (emphasis in original). Moreover, the court determined that language in
 14 the parties’ agreement stating that the trust assets included “contributions required . . . to be made”
 15 established that unpaid employer contributions were plan assets at the moment they became due. *Id.*
 16 at 7. Consequently, the court held that the defendant breached his fiduciary duties to the plan
 17 beneficiaries by failing to pay contributions that he owed. *Id.* at 7-8.

18 In this case, the Fund claims that the language of its agreement with Moxley defines the
 19 pension fund assets as consisting of all contributions “to be made” to the fund.¹ Therefore, it argues
 20 that this Court should reach a similar result as the courts in *Temecula Mechanical* and *Atoll Topui*
 21 by concluding that Moxley’s unpaid withdrawal liability represents a plan asset. Even if the
 22 reasoning in those cases were adopted, the present dispute involves distinct issues. Here, Moxley’s
 23 withdrawal liability is at issue and he disputes that the term “contributions” in the parties’ trust
 24
 25

26 ¹ Article II, Section 1 of the Trust Fund Agreement states: “The Carpenters Pension Trust
 27 Fund for Northern California shall consist of all Contributions required by the Collective Bargaining
 28 Agreement or Subscriber’s Agreement to be made for the establishment and maintenance of the
 Pension Plan, and all interest, income and other returns of any kind, and any other money or
 property received or held by reason of or pursuant to this Trust.” Excerpts of Bankruptcy Record
 (ER) 142.

1 agreement encompasses this statutory obligation. More significantly, neither prior case considered
2 an employer's fiduciary duty within the context of a bankruptcy discharge.

3 In this instance, whether Moxley's withdrawal liability constitutes a plan asset need not be
4 resolved. Even if it were, the Fund must demonstrate, not just that Moxley acted as a fiduciary
5 according to the requirements of ERISA, but that he was a fiduciary within the specific meaning of
6 Bankruptcy Code section 523(a)(4). Under that provision, debt alleged to be nondischargeable
7 "must arise from a breach of trust obligations imposed by law, separate and distinct from any breach
8 of contract." *In re Baird*, 114 B.R. 198, 202 (9th Cir. BAP 1990). Fiduciary status may be imposed
9 on a debtor by state or federal statute if the law: "(1) defines the trust res; (2) identifies the
10 fiduciary's fund management duties; and (3) imposes obligations on the fiduciary prior to the
11 alleged wrongdoing." *In re Hemmeter*, 242 F.3d at 1190.

12 In this case, there are no allegations that Moxley was a named fiduciary of the plan or that he
13 possessed any management or administrative duties with regard to the pension fund. Instead, the
14 Fund maintains that Moxley is acting as a fiduciary because he exercises discretionary authority
15 over the unpaid withdrawal liability. In *Atoll Topui*, on which the Fund relies, the court concluded
16 that "by failing to pay contributions when due, Mr. Topui exercised authority and/or control over
17 plan assets and thus is deemed a 'fiduciary.'" No. C 06-3059 SBA, Dkt. 27 at 7. While that may
18 well be sufficient in the non-bankruptcy context, to conclude that a debt is nondischargeable the
19 fiduciary duty must exist "before the act of wrongdoing and not as a result of the act of
20 wrongdoing." *In re Hemmeter*, 242 F.3d at 1190. While the Fund urges the same outcome as in
21 *Atoll Topui*, its sole basis for charging Moxley with fiduciary duties over trust assets is that he has
22 failed to pay a debt owed to the Fund. In other words, the Fund does not identify any fiduciary
23 obligations existing prior to and independent of the withdrawal liability. Accordingly, Moxley is
24 not a fiduciary of the Fund within the meaning of 11 U.S.C. section 523(a)(4) and thus has not
25 committed any defalcation of its assets.

26 B. Waiver

27 According to the Fund, Moxley waived all defenses with respect to his withdrawal liability
28 by failing to request arbitration properly during the time period imposed by statute. Pursuant to the

1 Multiemployer Pension Plan Amendments Act of 1980 (“MPPAA”) amending ERISA, “any
2 dispute” between an employer and a multiemployer plan sponsor related to the determination of
3 withdrawal liability must be resolved through arbitration. *See* 29 U.S.C. § 1401(a)(1). If arbitration
4 is not initiated then “the amounts demanded by the plan sponsor . . . shall be due and owing on the
5 schedule set forth by the plan sponsor.” 29 U.S.C. § 1401(b)(1); *see also Board of Trustees v.*
6 *Ceazan*, 559 F. Supp. 1210, 1218 (N.D. Cal. 1983). Thus, as stated in its motion for summary
7 judgment in the bankruptcy proceeding, the Fund believes that “Moxley has waived any argument
8 contesting the existence or amount of withdrawal liability.” ER 399.

9 In this appeal, the Fund appears to be arguing something further, *i.e.*, that such failure to
10 arbitrate the amount of withdrawal liability extends to bar Moxley from seeking discharge of the
11 debt in bankruptcy. The exceptions to discharge are expressly governed by 11 U.S.C. section 534.
12 No support exists for the Fund’s position that the MPPAA requirement to arbitrate is intended to
13 override the provisions of the Bankruptcy Code. Therefore, Moxley has not waived his right to seek
14 discharge in bankruptcy of debt based on ERISA withdrawal liability.

15 C. Sua Sponte Grant of Summary Judgment

16 Finally, the Fund contends that the bankruptcy court erred by sua sponte entering summary
17 judgment in favor of Moxley. A court may grant summary judgment sua sponte to the non-moving
18 party where “at the hearing, it is made to appear from all the records, files, affidavits and documents
19 presented that there is no genuine dispute respecting a material fact essential to the proof of
20 movant’s case and that the case cannot be proved if a trial should be held.” *Cool Fuel, Inc. v.*
21 *Connett*, 685 F.2d 309, 311 (9th Cir. 1982). In this instance, the Fund argues that it had no notice
22 that the bankruptcy court was considering summary judgment in favor of Moxley. It therefore
23 claims it was denied an opportunity to present evidence on whether Moxley’s business received
24 income after the withdrawal liability was assessed that allegedly should have been paid to the Fund.
25 According to the Fund, this question represents a disputed issue of material fact. In a related
26 argument, the Fund also alleges that the bankruptcy court erred by apparently considering Moxley’s
27 evidence of his business income, without ruling on the Fund’s objections to it.

28

The bankruptcy court concluded that Moxley did not commit any defalcation as “he merely failed to use his personal assets, to the extent he had any, and which he obviously did not hold in trust for the Fund, to pay his debt to the Fund.” ER 510. Thus, in considering the question of whether Moxley’s debt was dischargeable, the bankruptcy court considered the extent of Moxley’s income as irrelevant. Instead, the bankruptcy court based its grant of summary judgment on a determination that Moxley was not a fiduciary of the Fund within the meaning of section 534(a)(4). As this Court agrees with that conclusion, the existence or amount of any income from Moxley’s business is simply not a material dispute and no triable issue remains with respect to the Fund’s claim that Moxley’s debt is nondischargeable. Accordingly, the Fund is not entitled to a reversal of the bankruptcy court’s decision based on its sua sponte grant of summary judgment in favor of Moxley.

V. CONCLUSION

13 The denial of the Fund's motion for summary judgment and the grant of summary judgment
14 in favor of Moxley by the bankruptcy court is affirmed.

16 IT IS SO ORDERED.

18 || Dated: 3/30/11



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE